87-211

No. .....

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1986

CHARLES J. BLACK, WARDEN,
NEBRASKA STATE PENITENTIARY,

Petitioner,

v.

DARWIN JAY ROBINSON, SR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Do the standards announced in *Strickland v. Washington,* 466 U.S. 668 (1984), which govern the determination of whether trial counsel has rendered effective assistance of counsel as required by the Sixth Amendment, similarly apply to judge the performance of appellate counsel?

A. Did respondent's court-appointed appellate counsel violate the responsibilities of competent counsel set forth in *Anders v. California,* 386 U.S. 738 (1967), when he included in his withdrawal brief his reasons for believing that the appeal would be frivolous?

B. If the withdrawal brief submitted by respondent's counsel was deficient, did the appellate court err when it failed to require a showing of actual prejudice?

PARTIES TO THIS ACTION

The sole parties to the proceeding are Petitioner, Charles J. Black, Warden, Nebraska State Penitentiary, and Respondent, Darwin Jay Robinson, Sr.

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The petitioner, Charles J. Black, Warden, Nebraska State Penitentiary, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on March 5, 1987, rehearing denied on May 5, 1987.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at *Robinson v. Black,* 812 F.2d 1084 (8th Cir. 1987). (See Appendix B).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit sought to be reviewed was entered by issuance of its opinion on March 5, 1987. (See Appendix B).

Petition for Rehearing With Suggestion for Rehearing en banc was timely filed on March 18, 1987, by Charles J. Black, Warden. An Order was entered on May 5, 1987, denying motion of Black for rehearing. (See Appendix A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1983).

CONSTITUTIONAL PROVISIONS

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution, Section 1:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

———o———

STATEMENT OF THE CASE

This case was first filed in the federal district court under 28 U.S.C. § 2254 (1982).

On November 2, 1981, Respondent was found guilty by a jury of armed robbery, using a knife in the commission of a felony and being an habitual criminal. Respondent had been previously tried on these charges, but the first trial had been declared a mistrial due to the jury's inability to reach a verdict.

On direct appeal, Respondent's court-appointed counsel moved to withdraw from the case pursuant to Nebraska Supreme Court Rule 3(B). Rule 3(B)(3)(a) requires that the motion to withdraw "shall state that counsel has reviewed the entire record, researched the applicable law, and has concluded that the appeal is frivolous." Rule 3(B)(3)(b) requires that the "motion to withdraw must be accompanied by a brief referring to anything in

the record which might arguably support the appeal." (See Appendix F).

Respondent's attorney submitted the required brief with his withdrawal motion. (See Appendix E). In the sixteen-page brief, counsel identified the issues his client might raise on appeal, applied the controlling law to the issues and concluded that the appeal was without merit. The Nebraska Supreme Court granted counsel's motion to withdraw and affirmed Respondent's conviction pursuant to Rule 3(B)(3)(d), Rule 3(B)(3)(e) and Rule 3(B)(4). (See Appendix F). *State v. Robinson,* No. 82-028, 213 Neb. (xvii) — N.W.2d — (1982).

Thereafter, Respondent filed two pro se post conviction actions under Neb.Rev.Stat. §§ 29-3001 et seq. (Reissue 1985). The first action was dismissed because Respondent did not provide a proper record. The second action included the claim that Respondent was denied his right to effective appellate counsel because there were two valid issues which court-appointed counsel should have raised and argued on direct appeal. The Nebraska Supreme Court rejected this claim since under *Strickland v. Washington,* 466 U.S. 668 (1984), Respondent failed to show that there was a reasonable probability that the appeal would have been successful had Respondent's counsel not withdrawn. *State v. Robinson,* 218 Neb. 156, 160-162, 352 N.W.2d 879, 881-882 (1984). (See Appendix G).

Respondent next filed a petition for writ of habeas corpus in the federal district court under 28 U.S.C. § 2254 (1982). Respondent included in his claims the issue that his court-appointed appellate counsel was ineffective "because he failed to recognize and raise meritorious assign-

ments of error and withdrew from the appeal in a manner violative of due process." (See Appendix D, at 17).

The district court rejected this claim, holding that the withdrawal brief "was not a mere conclusional no-merit letter to the court . . . but rather reflected a professional and conscientious evaluation of the record and the points which might have supported an appeal." *Id.* at 19. The district court also stated that the Respondent had failed to demonstrate prejudice as a result of his counsel's actions. *Id.* The district court dismissed Respondent's petition for writ of habeas corpus. (See Appendix C).

Respondent appealed the district court's order to the Eighth Circuit Court of Appeals. The Eighth Circuit reversed the judgment of the district court for the sole reason that Respondent was denied effective assistance of appellate counsel. The Eighth Circuit's analysis of Respondent's Sixth Amendment claim did not cite or rely on *Strickland*. The Eighth Circuit concluded that the brief submitted by counsel with his motion to withdraw failed to comply with the requirements of *Anders v. California*, 386 U.S. 738 (1967). (See Appendix B). It made no finding that there was a reasonable probability that Respondent's appeal would have been successful had counsel filed a proper brief. *Id.*

———o———

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD ISSUE TO RESOLVE THE CONFLICTS BETWEEN THE CIRCUITS REGARDING APPLICATION OF THE STANDARDS ENUNCIATED IN *STRICKLAND V. WASHINGTON* TO JUDGE THE PERFORMANCE OF APPELLATE COUNSEL.

This case squarely raises the question specifically left open by this Court in *Evitts v. Lucey,* 469 U.S. 387, 392 (1985), when it stated:

> We therefore need not decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel. Cf. *Strickland v. Washington,* 466 U.S. 668 (1984); *United States v. Cronic,* 466 U.S. 648 (1984).

Strickland v. Washington, 466 U.S. 668 (1984), promulgated the two-prong standard that, in order for ineffectiveness of trial counsel to be of constitutional proportions, it must be unreasonable under prevailing professional norms and it must be prejudicial to the defense. In this case, the Sixth Amendment issue arises in the context of an appeal dismissed under *Anders v. California,* 386 U.S. 738 (1967). A writ of certiorari should be granted to resolve blatant conflicts between the circuits regarding the appropriate Sixth Amendment standards of judging appellate counsel's performance in this context. As discussed hereinafter, the circuit courts are divided not only on the question of what conduct by counsel is professionally reasonable in an *Anders* situation, but also on the question of whether prejudice must be established.

In *Anders,* this Court set forth the responsibilities of appointed counsel when counsel concludes that his client's

criminal appeal appears to be wholly frivolous and seeks the appellate court's permission to withdraw. Specifically, this Court held that:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.

386 U.S. at 744. The use of a "no-merit" letter in which court-appointed counsel merely advises the appellate court of his "bare conclusion" that the appeal is frivolous was disapproved by the *Anders* decision.

In stark contrast to the one-paragraph "no-merit" letter at issue in *Anders*, appointed counsel in the instant case submitted a sixteen-page brief setting forth potential issues on appeal, together with a detailed analysis of the facts of the case and applicable law. Counsel discussed each of the issues separately, explaining why he believed the arguments to be frivolous. The district court below, in evaluating the sufficiency of counsel's brief, found that it "complie[d] with the spirit of *Anders* . . . ." (See Appendix D at 19). The court further stated:

> It was not a mere conclusional no-merit letter to the court, *Demarrias v. United States*, 444 F.2d 162 (8th Cir. 1971); *Smith v. United States*, 384 F.2d 649 (8th Cir. 1967), but rather reflected a professional and conscientious evaluation of the record and the points which might have supported an appeal.

Id.

Conversely, the Eighth Circuit Court of Appeals on review concluded that "*Anders*' dictates were woefully un-

satisfied'' by counsel's brief. (See Appendix B at 7). The court premised its finding on the determination that "[c]ounsel did not act as an advocate for Robinson when he briefed all issues in favor of the government and concluded Robinson's claims were meritless.'' *Id.*

The divergent conclusions reached by the district court and Eighth Circuit are merely representative of a wider conflict which exists among the several circuits concerning the substance of withdrawal briefs. The conflict appears to turn on contrary interpretations of *Anders'* requirement that appointed counsel submit a withdrawal brief "*referring to* anything in the record that might arguably support the appeal.'' *Anders,* 386 U.S. at 744 (emphasis added). Under the Eighth Circuit Court's interpretation, appointed counsel violates *Anders* by submitting a brief which, even though it identifies and extensively analyzes all issues possibly raised on appeal, nonetheless sets forth counsel's basis for concluding that an appeal would be meritless. In effect, the court has substituted the word ''arguing'' for the words ''referring to'' which appear in the emphasized portion of the preceding excerpt of the *Anders* opinion.

The District of Columbia Circuit Court of Appeals espoused a similar view in *Suggs v. United States,* 391 F.2d 971 (D.C. Cir. 1968). In that case the court held that a brief accompanying counsel's motion to withdraw should be limited to "a presentation devoted to arguments for the accused . . . '' *Id.* at 975. *See also, United States v. Blackwell,* 767 F.2d 1486 (11th Cir. 1985).

Other circuit courts have not, however, construed *Anders* to require such a result. In *Nell v. James,* 811 F.2d 100 (2nd Cir. 1987), the Second Circuit Court of Appeals recently stated:

> Preparing an *Anders* brief is an important responsibility, one that requires counsel to search the record with care, *and then to explain why there are no non-frivolous issues present.*

Id. at 104 (emphasis added). An identical view of appointed counsel's duty under *Anders* was expressed by the Seventh Circuit Court in *United States v. Edwards,* 777 F.2d 364 (7th Cir. 1985). There the court declared that counsel "must file a brief that will advise the court of what points he might have raised and why he thinks they would have been frivolous." *Id.* at 365.

In an earlier Seventh Circuit Court opinion, *Nickols v. Gagnon,* 454 F.2d 467 (7th Cir. 1971), Judge Stevens, now Supreme Court Justice Stevens, strongly criticized that view of *Anders,* which now has been adopted by the Eighth Circuit, when he stated:

> This interpretation attaches paramount importance to the form, rather than the substance of a lawyer's representation. It is based on a slight, though critical, modification of the language of the *Anders* opinion, and fails to read that language against the reasons which *Anders* had advanced for holding the California practice unconstitutional.
>
> * * *
>
> Contrary to the interpretation of *Anders* for which appellant contends, that opinion does not require a petition for withdrawal to be accompanied by a brief "*arguing* anything in the record that might support the appeal." Nor does the word "brief" itself necessarily connote an adversary presentation of points that are demonstrably without merit. It does connote a professional exposition of all points which have sufficient significance that trained counsel would at least

identify and consider them in his evaluation of an appeal.

* * *

If appointed counsel were obligated in every case to make arguments that amount to little more than meaningless charades, a subtle but invidious distinction between appointed and retained counsel might develop. The indigent, unlike the nonindigent defendant, would lose the benefit of retained counsel's implicit representation to the court that he believes in the legal substantiality of the contentions advanced.

Id. at 470-472 (footnotes deleted).

In view of the obvious conflict which now exists with regard to the content and sufficiency of withdrawal briefs, further clarification by this Court is warranted, indeed, imperative. The Eighth Circuit Court's opinion leaves court-appointed appellate counsel in a quandry regarding their professional responsibilities under *Anders*.

Further, the Eighth Circuit opinion ignores the question left unanswered in *Evitts* regarding whether the *Strickland* requirement of actual prejudice applies to Sixth Amendment claims challenging the performance of appellate counsel. In reversing the decision of the district court, the Eighth Circuit simply concluded that the assistance of counsel afforded Respondent on direct appeal violated the Sixth Amendment (See Appendix B at 9). The Court failed to articulate the standard of review it applied in reaching this conclusion. However, the implication of its decision is that no showing of actual prejudice is required.

This decision of the Eighth Circuit stands in direct conflict with that of the Tenth Circuit in *Griffin v. West*, 791 F.2d 1578 (10th Cir. 1986), which held that failure to

file an appellate brief, even if it constituted unprofessional conduct, did not require issuance of a writ of habeas corpus because "there was no showing of a reasonable probability that the result of the proceeding would have been different." *Id.* at 1583. Similarly, the Fifth Circuit in *Lockhart v. McCotter,* 782 F.2d 1275 (5th Cir. 1986), said that deficient performance by appellate counsel in mistakenly stating that an appeal was without merit did not justify a writ of habeas corpus because the petitioner "failed to demonstrate a reasonable probability that but for appelllate counsel's unprofessional errors, the result of Lockhart's appeal would have been different." *Id.* at 1283.

On the other hand, the Eleventh Circuit in *Cannon v. Berry,* 727 F.2d 1020, (11th Cir. 1984), a case decided prior to this Court's decision in *Strickland v. Washington,* reached a conclusion consistent with that of the Eighth Circuit. The court in *Cannon* said that a showing of prejudice is not required "because to do so would erode the requirements set forth in *Anders v. California* . . . " *Id.* at 1024. This reasoning appears to reflect an unwarranted lack of confidence in the professionalism of counsel, a concern not shared by this court in *Strickland.* There is no reason to believe that appellate counsel, anymore than trial counsel, would shirk their professional responsibilities solely because their client must later show actual prejudice flowing from counsel's performance.

A Sixth Amendment standard of reviewing the performance of appellate counsel which omits a requirement of prejudice, such as that which is apparently the law in the Eighth and Eleventh Circuits, has a profoundly negative effect on the notion of finality of criminal judgments without advancing any interest in justice. If allowed to

stand, the decision in this case will result in numerous new direct state court appeals without any offsetting benefits. It will not enhance the reliability of the outcome of state court appeals.

—o—

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner urges that the decision of the Eighth Circuit Court of Appeals should be reversed and the decision of the United States District Court for the District of Nebraska should be reinstated.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1710-NE

Darwin Jay Robinson, Sr.,	)	
Appellant,	)	
vs.	)	Appeal from the
	)	United States Dis-
Charles J. Black, Warden	)	trict Court for the
Nebraska State Penitentiary,	)	District of
	)	Nebraska
Appellee.	)	

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

May 5, 1987

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1710

Darwin Jay Robinson, Sr.,	)	
	)	
Appellant,	)	Appeal from the
	)	United States
v.	)	District Court for
	)	the District of
Charles J. Black, Warden,	)	Nebraska.
Nebraska State Penitentiary,	)	
	)	
Appellee.	)	

Submitted: December 12, 1986

Filed: March 5, 1987

Before LAY, Chief Judge, WOLLMAN, and MAGILL, Circuit Judges.

LAY, Chief Judge.

Darwin Jay Robinson, Sr., brought this habeas corpus action to challenge his 1981 Nebraska conviction for armed robbery, using a knife in the commission of a felony, and being a habitual criminal. The district court[1] denied Robinson's petition. On appeal, Robinson argues that he

[1]The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska, presiding.

had ineffective assistance of counsel at a pretrial suppression hearing, that impermissibly suggestive procedures were used to identify him as the robber, that illegally seized evidence was used to convict him, that he was wrongfully interrogated by a state informant without counsel, and that he was denied effective assistance of counsel on direct appeal of his conviction.

We sustain Robinson's claim that he was deprived of effective assistance of counsel on his state appeal and therefore reverse the district court.

Background

Shortly before 7:00 a.m. on January 31, 1981, a convenience store in Omaha, Nebraska, was robbed at knifepoint. Store attendant Marvin Pfeifer and Michael Klaumann, an employee just coming on duty as the robbery ended, were the primary witnesses to the incident. When Pfeifer told Klaumann what had happened, Klaumann got in his car and pursued the man he had just passed in the doorway. The suspect drove a white Buick to an apartment complex a few blocks away. Klaumann soon led police to that complex, and they towed the white Buick away. Moments later, a woman identifying herself as Shirley Robinson (the petitioner's wife) telephoned the police that her car had been stolen. Two officers then entered the petitioner's apartment, where the woman, who actually was Edna Lyncook, continued to identify herself as Shirley Robinson. The officers saw an 8 x 10 color photograph of Darwin Robinson in the apartment. The

phony Mrs. Robinson allowed[2] an officer to remove the picture from the apartment.[3] When the police told the woman that the car had been involved in a robbery, she admitted her real identity and told the officers that Darwin Robinson was upstairs in her mother's apartment. (Lyncook testified at trial that Darwin Robinson had instructed her to file the false stolen car report.) The police went upstairs and arrested Robinson.

The officers then took Robinson downstairs to his apartment. At this point the real Mrs. Robinson was found there. The police did not get a warrant, did not use a consent form, and did not seek Darwin Robinson's consent to search the apartment further. A blue jacket similar to one described by Klaumann as being worn by the robber was found.[4] The police then took Robinson to the convenience store and walked him in front of Klaumann, who identified him as the robber.

While Robinson was jailed pending trial, another inmate, Robert Koppock, obtained information from Robinson about the offense charged. What Robinson did not then know was that before being arrested Koppock was

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[2]This was disputed at the supression hearing, but the trial court found consent. Robinson's appointed counsel did not call Lyncook to testify at the suppression hearing, an omission that forms the basis of Robinson's ineffective assistance of trial counsel claim.

[3]The officer took the photograph back to the scene of the robbery and allegedly said "That's the man" as he showed the picture to Klaumann. Klaumann then identified Robinson from the photograph as being the robber. This procedure and the "parading" of Robinson in front of Klaumann, as discussed *infra*, produced another constitutional challenge to the identification.

[4]Introduction of this jacket and the 8 x 10 photograph is the basis of Robinson's fourth amendment challenge.

a paid informer for the Nebraska Highway Patrol, and his salary continued at $100 per week while in jail. Koppock testified at trial as to Robinson's allegedly incriminating statements and other information received from Robinson.[5]

Robinson was tried twice for the robbery. The first trial was held on October 5, 1981, but the presiding judge declared a mistrial when the jury was unable to reach a verdict. The second trial began on November 2, 1981. After hearing the evidence, the jury deliberated over six hours before finding Robinson guilty of armed robbery, using a knife in the commission of a felony, and being a habitual criminal under Neb. Rev. Stat. § 29-2221 (1979).

On direct appeal to the Nebraska Supreme Court, Robinson's court-appointed attorney filed a motion for leave to withdraw, accompanied by a brief in support of the motion, pursuant to Nebraska Supreme Court rules. In the sixteen-page brief, counsel presented the issues his client could possibly raise on appeal, then went on to analyze the challenges and conclude that all were meritless. For nearly seven pages counsel openly supported the trial court's various rulings with case citations and counsel's own opinions. The supreme court granted counsel's motion to withdraw, and Robinson pursued his appeal without assistance. The appeal was denied as frivolous. *State v. Robinson,* No. 82-028 (1982) (unpublished decision).

Robinson next filed a pro se post conviction action under Neb. Rev. Stat. §§ 29-3001 to -3004 (1979), but relief

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[5]Robinson challenges this testimony as violating his sixth amendment right to have counsel present at all interrogations. We discuss this issue briefly below. *See infra* note 8.

was denied for failure to provide a proper evidentiary record. *See State v. Robinson,* 215 Neb. 449, 339 N.W.2d 76 (1983). Robinson's second motion for post conviction relief, also brought pro se, was dismissed on the merits. *See State v. Robinson,* 218 Neb. 156, 352 N.W.2d 879 (1984). Robinson then filed the present petition for a writ of habeas corpus in the federal district court, pursuant to 28 U.S.C. § 2254 (1982). Counsel was appointed to represent Robinson in federal court.

Discussion

Among the various claims we need only discuss Robinson's argument that he was denied effective assistance of appellate counsel in violation of the sixth amendment.[6] Robinson argues to this court that his appointed trial counsel's motion to withdraw and accompanying brief denied him the constitutional protections required by *Anders v. California,* 386 U.S. 738 (1967). We must agree.

Anders sets forth the conditions under which an indigent defendant's appointed counsel can withdraw on appeal. In order to protect the defendant's rights, counsel must first brief "anything in the record that might ar-

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[6]The sixth amendment right to effective counsel in criminal proceedings extends to indigent persons on direct appeal. *Douglas v. California,* 372 U.S. 353, 357-58 (1968). As the Court stated in *Anders v. California,* 386 U.S. 738 (1967):

> [T]his Court has consistently held invalid those procedures "where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself."

Id. at 741 (quoting *Douglas,* 372 U.S. at 358).

guably support an appeal." *Id.* at 744. This mandatory briefing must be done as an *advocate:* "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae.*" *Id.* It is for the court to determine whether the appeal is frivolous, not the defendant's counsel. *Id.*

Our reading of the brief submitted by Robinson's counsel in his motion to withdraw leads us to the conclusion that *Anders'* dictates were woefully unsatisfied. Counsel did not act as an advocate for Robinson when he briefed all issues in favor of the government and concluded Robinson's claims were meritless.[7] Robinson had a right to ex-

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[7]The following are excerpts from the brief:

> Prior to trial, there were hearings to determine the admissibility of the identification of the witness, statements made by the defendant to a fellow prisoner (Mr. Koppock) in jail, and evidence seized at his apartment at the time of the arrest. * * * There was no error in the Court's overruling the motions. * * * The fact that Mr. Koppock voluntarily chose to divulge information received from the defendant to the police is beyond the reach of *Miranda v. Arizona* under the facts in this case.
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> * * *
>
> The Court also properly allowed into evidence exhibits seized at the defendant's apartment. * * * Counsel cannot say that the Court abused its discretion in finding under the totality of the circumstances that the police had received consent, at least from individuals who had identified themselves as the occupants of the apartment, pursuant to the explicit instructions of the defendant himself.
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> * * *

(Continued on following page)

pect counsel to brief and argue his case to the best of counsel's ability, showing the most favorable side of the defendant's arguments. Counsel changed the adversarial process into an inquisitorial one by joining the forces of the state and working against his client. Upon counsel's withdrawal, Robinson was left to proceed pro se against the state, which had the benefit of appointed counsel's brief.

This court has applied the *Anders* principles in similar cases. In *Smith v. United States,* 384 F.2d 649 (8th Cir. 1967), appointed counsel made an independent decision that his client had 'no genuine issue or legal point which can

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(Continued from previous page)

It is clear from the totality of the circumstances that the identification by Mr. Klaumann was not tainted by any impermissible police practices, and specifically not by viewing a single photograph of the defendant at the scene. * * * It would appear that even if there had been some error in the photographic identification, that it would have been harmless beyond a reasonable doubt in view of the other identification evidence presented by Mr. Klaumann.

* * *

In addition to the discussion of these matters in the context of the motion to suppress, which arguments are incorporated herein by reference, the Court has broad discretion in allowing the admission of articles or objects to which testimony relates when any fact or issue may be explained by such production. *State v. Eickmeier,* 187 Neb. 491, 191 N.W.2d 815 [1971]. The Court did not abuse its discretion in allowing admission of these objects.

* * *

The defendant made the usual motion for a directed verdict. There is clearly sufficient evidence, if believed, to find the defendant guilty. * * * While there are some discrepancies, the credibility of the witnesses and the weight of their testimony is for the jury to decide and will not be disturbed unless clearly wrong. *State v. Leary,* [185 Neb. 76, 173 N.W.2d 520 (1970)]. It is clear the jury chose to believe the State's version of the events that occcurred rather than the defendant's story.

be raised [on] appeal," *id.* at 649, cited cases and arguments supporting this conclusion, and sought to withdraw. This court, denying the motion to withdraw, observed: "The present application is of little help to either the court or the client. The cause of advocacy is not served to read a brief filed by appellant's own counsel asserting the government's position in the case." *Id.* at 650. The same approach was followed in *DeMarrias v. United States,* 444 F.2d 162, 164-65 (8th Cir. 1971): "A defendant is entitled to due process in the court's determination of whether his appeal is wholly frivolous. Due process requires the court, with the assistance of briefs of defense counsel setting forth any grounds arguably supporting the appeal, to make a full examination of the record before determining that the appeal is wholly frivolous."

We conclude that the "assistance" of counsel afforded to Robinson on direct appeal violated the sixth amendment as interpreted by the United States Supreme Court in *Douglas* and *Anders,* and as applied by this court in *Smith* and *DeMarrias.* As briefed and argued by petitioner's present counsel, the arguments for overturning Robinson's conviction are far from frivolous.[8] Robinson had a right

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[8]For example, a strong argument can be made that the testimony of Koppock, the paid government informant, violated Robinson's sixth amendment right to have counsel present during interrogation. *See Massiah v. United States,* 377 U.S. 201, 206 (1964) (applying sixth amendment to preclude government agents' attempts to "deliberately elicit[]" incriminating statements in absence of accused's lawyer); *see also Kuhlmann v. Wilson,* 106 S. Ct. 2616, 2630-31 (1986) (upholding conviction when informant was "merely listening"); *Maine v. Moulton,* 106 S. Ct. 477, 488-90 (1985) (affirming suppression of taped conversations between defendant and informant when state knowingly exploited opportunity to confront defendant without counsel).

(Continued on following page)

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Under *United States v. Henry*, 447 U.S. 264 (1980), the government violates a suspect's sixth amendment right to counsel when it creates a situation likely to induce the defendant to make incriminating statements outside the presence of his attorney. *Id.* at 270-73. To fall within this rule, however, the informant must be an agent of the state, acting under governmental instructions when eliciting information from fellow prisoners. *United States v. Surridge*, 687 F.2d 250 (8th Cir.), *cert. denied*, 459 U.S. 1044 (1982).

An arguable claim exists that Koppock was acting in the capacity of a government agent when he obtained evidence used to incriminate Robinson. Koppock, before he was arrested, was paid $100 per week to provide information on criminal activity. His employer in this regard was the Nebraska State Highway Patrol. We recognize that Koppock was arrested and jailed on actual criminal charges, thus, like the *Surridge* informant, he was not a typical "plant" by the state used to secure information. *Cf. United States v. Hicks*, 798 F.2d 446, 448-49 (11th Cir. 1986) (no violation when informant imprisoned on unrelated charges obtained jailhouse confession without instruction from government to do so), *cert. denied*, 55 U.S.L.W. 3473 (1987). Also, there is no indication that Koppock was instructed to question Robinson or any other prisoner, as it is unclear whether the state knew that one of its informants had been arrested. *Cf. id.* at 448 (government "fortuitously" obtained the incriminating statements). Notwithstanding these points, the fact remains that Koppock was a paid law enforcement informant at all times relevant to this case and was acting as an agent of the state when he elicited the statements from Robinson. Koppock did what he was paid to do, even if he acted without specific instructions. *See Surridge*, 687 F.2d at 254 "[T]he key issue is the extent of government involvement. When the government pays an informant, it is evidence (although not conclusive) that a prior agreement between the government and the informant existed, whether that agreement was explicit or implicit."); *cf. United States v. Sampol*, 636 F.2d 621, 638 (D.C. Cir. 1980) (disallowing testimony of "informant at large" when informant "forge[d] ahead on [his] own" in eliciting information from fellow inmate).

We point out again that it took two trials, and much deliberation in the second, for a jury to convict Robinson. Koppock's testimony may have tipped the balance toward the jury's guilty verdict. In light of this, appointed counsel had a duty to press the *Massiah* and *Henry* issue, and any other colorable issue, on direct appeal.

to assistance of counsel in presenting these arguments to the Nebraska Supreme Court.

Present counsel is now familiar with Robinson's case and has performed well in this court. We are confident he could well-represent Robinson as appointed counsel in a plenary appeal before the state supreme court. Counsel should file a motion before the state supreme court seeking to reinstate his appeal and to appoint counsel to brief all issues. If the state supreme court reinstates Robinson's appeal, with new briefing and argument by appointed counsel, the federal district court should dismiss the present petition. This is the remedy approved by other federal courts when the dictates of *Anders* have been violated. *See Barnes v. Jones,* 665 F.2d 427, 436 (2d Cir. 1981), *rev'd on other grounds,* 463 U.S. 745 (1983) (no *Anders* violation so no need for new appeal); *High v. Rhay,* 519 F.2d 109, 113 (9th Cir. 1975); *Gulliver v. Dalsheim,* 574 F. Supp. 111 (S.D.N.Y. 1983) (reinstating earlier grant of habeas writ unless new state appeal heard within 90 days), *rev'd on other grounds,* 739 F.2d 104 (2d Cir. 1984) (finding no *Anders* violation). If the state supreme court fails to reinstate the appeal within a reasonable time, the district court should grant the writ of habeas corpus unconditionally. We therefore vacate the judgment of the district court and remand with direction to conditionally grant the writ of habeas corpus.

JUDGMENT REVERSED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DARWIN JAY ROBINSON, SR., Petitioner,	) CV 84-L-577
VS.	) ORDER OF DISMISSAL
CHARLES J. BLACK, Respondent.	) (Filed May 15, 1986)

In accordance with the memorandum of today and the report and recommendation of the magistrate of February 7, 1986,

IT IS ORDERED that the petition for habeas corpus is dismissed for failure to state a cognizable claim under 28 U.S.C. § 2254.

Dated this 15th day of May, 1986.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DARWIN JAY ROBINSON, SR.,	)	CV84-L-577
	)	
Petitioner,	)	REPORT AND
	)	RECOMMENDA-
v.	)	TION
	)	
CHARLES J. BLACK,	)	(Filed March 10,
	)	1986)
Respondent.	)	

The parties in this habeas action have submitted briefs in accordance with my order dated December 28, 1984. The petitioner has submitted a reply brief through counsel which, at his request, includes his pro se argument on several grounds for relief. The petitioner challenges his convictions for robbery, use of a knife in the commission of a felony and the court's habitual criminal finding, for which he is serving sentences of 15 to 45 years and 10 years consecutively, incarcerated at the Nebraska State Penitentiary.

The petition raises these claims for relief:

1. Denial of effective assistance of counsel in that pretrial counsel failed to call a witness to testify to the illegal seizure of an 8x10 photograph;

2. Denial of effective assistance of counsel during the direct appeal in that appellate counsel failed to brief meritorious issues;

3. The identification procedure using a single photograph of petitioner was unnecessarily suggestive and violative of the Fourteenth Amendment Due Process Clause;

4. The identification procedure of a one-man show-up of the petitioner was unnecessarily suggestive and violative of the Fourteenth Amendment Due Process Clause;

5. The use of the photograph, the blue nylon jacket, and the identification evidence at trial violated due process as these items were obtained in violation of the Fourth Amendment;

6. The introduction of an informant's testimony interfered with and violated petitioner's Sixth Amendment right to counsel.

The parties agree that these claims have been exhausted. Because the Nebraska Supreme Court has had an opportunity to address each of these issues, either on counsel's motion to withdraw from the appeal or on petitioner's post conviction actions, these claims are exhausted and may be considered in this habeas action.

The parties also agree on a version of the facts summarized as follows: On January 31, 1981, shortly before 7 a. m., a convenience store attendant, Marvin Pfeifer, was robbed at knife point. As the robber was leaving the store, another store employee, Michael Klaumann, was entering the store. Pfeifer told Klaumann that he had been robbed by the man who had just exited. Klaumann returned to his car and followed a white Buick to an apartment complex

parking lot. Klaumann observed the single occupant of the car and determined that he wore a blue jacket. He also saw the license number of the car and gave this information to the police.

The police had the white Buick towed from the apartment complex and subsequently responded to a call from a person at that address, representing herself as Mrs. Robinson, who reported that her car had been stolen. One of the officers who went to the residence took an 8x10 photograph of the petitioner from the apartment with the consent of the woman. Subsequently the woman admitted that she was not Mrs. Robinson, but Edna Lyncook, and that she lived in the apartment upstairs. The real Mrs. Robinson was found sleeping in one of the bedrooms of the residence and was apprised of the situation involving the car and the robbery. Police searched the apartment and seized a blue jacket with "UNO" logo and a baseball cap.

The petitioner was found in the upstairs apartment in which Edna Lyncook lived and was taken by police cruiser back to the convenience store for identification. Klaumann identified the petitioner as the robber from the 8x10 photograph shown him by a police officer and, later that day, confirmed that identification when officers had the petitioner get out of the police car for Klaumann's view.

At trial, Robert Koppock, an inmate of the Douglas County Correctional Center at the same time the petitioner was in custody on these charges, testified that during one of his conversations with the petitioner, the petitioner told him that he had robbed a Kwik Shop. Koppock was a paid informer receiving a salary from the state patrol but was incarcerated at that particular time on charges unrelated

to the petitioner and had not been asked by authorities to furnish information in this case.

The first trial ended in a mistrial when the jury was unable to reach a verdict. The jury in the second trial deliberated about six hours before finding the petitioner guilty of the charges. The convictions were affirmed on appeal after the Nebraska Supreme Court granted the petitioner's court-appointed counsel's motion to withdraw from a frivolous appeal under Supreme Court Rule 3B. The petitioner's first attempt at post conviction relief was dismissed for failure to file an evidentiary record of the trial court proceedings as a basis for the motion; the dismissal was affirmed on appeal. *State v. Robinson*, 215 Neb. 449 (1984). The petitioner's second post conviction motion raised several ineffective assistance of counsel claims which were rejected after hearing; and that decision was affirmed on appeal. *State v. Robinson*, 218 Neb. 156 (1984).

Petitioner claims that his counsel was ineffective in failing to call a witness at a suppression hearing and in his appellate performance. Under the standard for finding ineffective assistance of counsel pronounced in *Strickland v. Washington*, 466 U.S. 668 (1984), the petitioner must demonstrate, first, that counsel's performance was deficient, and second, that the deficient performance prejudiced his defense. The inquiry as to the performance of counsel is whether, considering all the circumstances, the performance was objectively reasonable under the prevailing professional norms. The actual prejudice required under the second prong of this standard can be shown if there is a substantial probability that, but for counsel's deficient per-

formance, the outcome of the proceeding would have been different.

The petitioner claims that his trial counsel was ineffective at the pretrial suppression hearing because he failed to call Edna Lyncook to testify to the illegal seizure of the 8x10 photograph of the petitioner. The claim is without merit because the petitioner is unable to show that he was prejudiced in any way by the absence of her testimony. There is no showing that the presentation of Lyncook's testimony would, with substantial probability, have resulted in the suppression of the photograph. Indeed, Lyncook's testimony at trial was basically in agreement with that of the police officers regarding the entry into the apartment and her consent to the seizure of the photograph. Nothing in the record indicates that Lyncook's testimony at the suppression hearing, had she been called as a witness, would have altered the evidence with regard to her consent, thus there is no basis for finding deficiency in counsel's failure to call her as a witness.

Petitioner also asserts that counsel was ineffective on appeal because he failed to recognize and raise meritorious assignments of error and withdrew from the appeal in a manner violative of due process. Indigent persons appealing criminal convictions are entitled to the assistance of counsel on their first appeal of right. *Douglas v. California,* 372 U.S. 353, 357-58 (1963). The representation by counsel in the appellate context is also governed by the *Strickland* standard. *Evitts v. Lucey,* 105 S. Ct. 830 (1985).

In *Anders v. California,* 386 U.S. 738 (1967), the United States Supreme Court recognized that is (sic) is appropriate for appellate counsel, if he or she finds the case whol-

ly frivolous, to so advise the court and request permission to withdraw; however, the Court emphasized that counsel's role in that context is still one of advocacy, not amicus curiae. To ensure constitutional protections when appointed counsel for an indigent client wishes to withdraw from a frivolous appeal, the Supreme Court requires that the request to withdraw be accompanied by a brief referring to "anything in the record that might arguably support an appeal." *Id.* at 744. A copy of the brief must be furnished to the client and time given for the client to raise any points he or she chooses. Upon counsel's performance of this advocacy function, it is the responsibility of the appellate court, after a full examination of all the proceedings, to decide whether in fact the case is wholly frivolous. If so, counsel may be allowed to withdraw and the appeal dismissed; if not, that is, if any legal points have at least arguable merit, the court must afford the indigent appellant the assistance of counsel to argue the appeal. *Id.*

In *Anders* the motion to withdraw was supported by a "no-merit letter" which read in its entirety:

> I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him . . . [H]e wishes to file a brief in this matter on his own behalf.

Id. at 742, quoting counsel's letter.

The brief in support of appellate counsel's motion to withdraw, which the Nebraska Supreme Court found to be in compliance with the court's Rule 3B, included a nine-page statement of facts documented by numerous references to the record. The brief pointed out issues of admissibility of identification testimony, statements of an in-

former, and evidence seized at petitioner's apartment, as well as sufficiency of the evidence, the habitual criminal determination, and propriety of the sentences. The brief discussed the facts and applied the law on each of these issues in a manner which demonstrates their lack of colorable merit and supports counsel's conclusion that any appeal would have been frivolous.

Such support for counsel's motion to withdraw complies with the spirit of *Anders,* which essentially seeks to ensure that indigent criminal defendants are not unfairly prejudiced on appeal by their inability to pay for counsel. It was not a mere conclusional no-merit letter to the court. *Demarrias v. United States,* 444 F.2d 162 (8th Cir. 1971); *Smith v. United States,* 384 F.2d 649 (8th Cir. 1967), but rather reflected a professional and conscientious evaluation of the record and the points which might have supported an appeal. *Nickols v. Gagnon,* 454 F.2d 467 (7th Cir. 1971), *cert. denied* 408 U.S. 925 (1972). Compare, *Suggs v. United States,* 391 F.2d 971 (D.C. Cir. 1968) (amicus-style brief specifically arguing against client's pro se contentions of error found violative). *Anders* does not require appointed counsel to make arguments that he would not consider worthy of inclusion in a brief submitted on behalf of a paying client, nor does it require counsel to urge reversal if he can find no merit in the appeal. *Nickols v. Gagnon, supra,* at 471.

The petitioner also complains that counsel was ineffective because he served the no-merit brief on the government attorney thus placing the petitioner at an even greater disadvantage. *Suggs v. United States, supra,* (cited by the petitioner) does suggest that service of a brief to withdraw on the government attorney compromises the adver-

sary system and may not be acceptable under *Anders*. In the petitioner's case, counsel served the brief on the government attorney, apparently pursuant to Nebraska Supreme Court Rule 3B(3)c.

Whether this provision violates due process even when the brief served it adversarial rather than amicus-style as in *Suggs*, need not be decided because the petitioner has not demonstrated prejudice as a result of such service. Neither has the petitioner demonstrated prejudice as a result of counsel's withdrawal and the dismissal of his appeal. Because the petitioner's assertions of prejudice partially overlap his remaining claims, my discussion of those claims will pertain both to their merit as grounds for habeas relief and as support for the ineffective assistance of counsel claim.

Impermissively Suggestive Identification

The petitioner claims that Klaumann's in-court identification of him as the robber should not have been admitted at his trial because it was based on two out-of-court identifications which were impermissibly suggestive and created a very substantial likelihood of irreparable misidentification violative of due process. This claim is made both to assert prejudice from counsel's failure to appeal on this issue, and as an independent due process ground for relief. Its lack of merit in the due process context resolves both issues.

It is not disputed that within hours of the robbery police showed Klaumann a single 8x10 color photograph of the petitioner which he identified as a picture of the robber, and a short time later asked Klaumann to identify the petitioner when police had him emerge in handcuffs

from a police cruiser for that purpose. This in-person show-up also resulted in a positive identification.

The claim is couched in the language of the two pronged inquiry applicable to the determination of constitutional violation in this situation: 1) Is the challenged confrontation "impermissively suggestive," and, if so, 2) whether, under the totality of the circumstances of this case, the suggestive confrontation created "a very substantial likelihood of irreparable misidentification." *Manson v. Brathwaite,* 432 U.S. 98, 116 (1977). Reliability is the "linchpin" of the admissibility determination and the essence of the second prong of the test. *Id.* at 114. Those identifications which are reliable—that is, where the witness' perception of the suspect unaided by the suggestive confrontation provided a sufficient foundation for the identification—are admissible.

This court in habeas actions is bound to defer to the factual findings made by the state court, unless the petitioner can establish that such factual determinations were erroneous. 28 U.S.C. § 2254; *Sumner v. Mata,* 449 U.S. 539 (1981). This presumption of corrections applies as well to findings of appellate state courts. *Graham v. Solem,* 728 F.2d 1533 (8th Cir. 1984), *cert. denied* 105 S. Ct. 148 (198) (sic). Thus, this court is constrained by the fact findings of the state court with regard to the identifications. In denying the motion to suppress the in-court identification, the trial court stated:

> And I find that the motion to suppress the in-court identification by the witnesses is denied. The defendant's motion to suppress physical evidence is also denied. This is a case where the man was practically followed—observed in the crime and followed from the

> scene of the crime to where the car was abandoned. And I feel that the defendant's entire motion should be denied and is denied.

Bill of Exceptions, Addendum, Proceedings of Suppression Hearing, p.63. The Nebraska Supreme Court dismissed without opinion the appeal in which this issue was raised by no-merit brief, and thus did not have occasion to add to the factual findings.

Because federal courts may draw inferences which are compatible with the state court fact findings, *Marshall v. Lonberger,* 459 U.S. 422 (1983), I infer from this somewhat criptic statement that the court found Klaumann's identification reliable based at least in part on his extended opportunity to view the perpetrator while following him to the apartment complex.[1] In those areas where the state court has not enunciated fact findings necessary for determination of the habeas issue, the federal court may look independently to the state court record. *Green v. Loggins,* 614 F.2d 219 (9th Cir. 1980); *Gregory v. Wyrick,* 564 F. Supp. 715 (W.D. Mo. 1983), *affirmed* 730 F.2d 542 (8th Cir.), *cert. denied* 105 S. Ct. 256 (1984).

I must consider five factors in assessing the record support for the state court's finding of reliability: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the criminal; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the length of time between the crime and the confrontation. *Neil v. Biggers,* 409 U.S. 188, 199-200 (1972).

First, immediately after the crime had been committed, Klaumann passed within a foot of the robber in

the doorway to the store, which the record indicates was well lit inside and outside. As the state court found, Klaumann had an extended opportunity to view the robber, albeit from a greater distance, when he followed the car to the apartment complex. Second, Klaumann testified that he took note of the man he passed in the doorway because he remembered him from previous encounters. Further, because Klaumann did not know about the robbery at that time, his perception was not clouded by the excitement of the crime. *United States v. Henderson,* 719 F.2d 934 (8th Cir. 1983). Third, Klaumann described the robber to police as a Negro male, about 5'8" tall, 23 to 24 years old, 160 pounds, with brown eyes and medium-brown complexion. He wore jeans, a dark blue nylon jacket with "UNO" emblem, and a maroon stocking cap. The description, while not exact, is not inconsistent with the appearance of the petitioner. Further, even questionable descriptions do not necessarily undermine the reliability of an identification such that the jury may not hear it. *United States v. Wade,* 740 F.2d 625 (8th Cir. 1984). Fourth, Klaumann positively identified the petitioner as the robber immediately and without hesitation both from the photograph and the show-up, in which the petitioner was not wearing the blue jacket. Fifth, the photographic show-up occurred not more than an hour and a half after the crime, and the in-person show-up not more than four hours after the crime.

Klaumann's testimony during the trial did not exclude the possibility that his in-court identification of the defendant was tainted by the suggestive pretrial identification procedures. Nevertheless, in light of the specific Biggers factors as they apply to this case, and fur-

ther, in light of the other identification evidence adduced at trial,[2] I conclude that any error in admitting Klaumann's identification testimony was harmless beyond a reasonable doubt. *United States v. Wade,* 740 F.2d 625 (8th Cir. 1984).

Inadmissibility of Physical Evidence

The petitioner argues that he was prejudiced by counsel's failure to appeal the admissibility of certain physical evidence—the 8x10 photograph and a blue jacket, both taken from the petitioner's residence. The illegal seizure of these items is also the subject of petitioner's Fourth Amendment claim (claim 5). The claim that evidence obtained in an unconstitutional search or seizure was introduced at the trial is not reviewable in federal habeas actions where the state has provided an opportunity for full and fair litigation of such a Fourth Amendment claim. *Stone v. Powell,* 428 U.S. 465 (1976). The petitioner invokes the exception to this bar by asserting that he was not allowed to fully and fairly litigate this claim because his counsel was ineffective on appeal. The search and seizure claim in this instance was included in counsel's withdrawal brief and in petitioner's response thereto, and was independently considered by the Nebraska Supreme Court in dismissing the appeal. It is clear that the petitioner did have the opportunity to litigate that claim, and took full advantage of it. Thus the merit of the Fourth Amendment claim may be considered only to the extent that it indicates prejudice to petitioner from his counsel's failure to raise it on appeal. *See, i.e. Rock v. Zimmerman,* 543 F. Supp. 179 (M.D. Pa. 1982).

The court denied the petitioner's motion to suppress the photograph and jacket as illegally seized evidence with language indicating that it resolved the credibility issue as to consent to search in favor of the state. The Nebraska Supreme Court recited the facts as found in the trial court regarding consent:

> One of the investigating officers asked Miss Lyncook, who was then representing herself to be Mrs. Robinson, whether he could have a photograph of Mr. Robinson. There is a dispute as to whether Miss Lyncook consented, but at the suppression hearing the trial court resolved that fact in favor of the State. The officer then left the location and returned to the convenience store, where he showed a photograph of Robinson to attendants. Klaumann immediately identified the photograph as being a picture of the robber. In the meantime, and while the officer was at the convenience store, Miss Lyncook admitted to the officers that in fact she was not Mrs. Robinson and that Robinson was upstairs in her apartment.

State v. Robinson, 218 Neb. 156, 158 (1984).

Again, this court in habeas is bound by the factual findings of the state court. 28 U.S.C. § 2254(d). Consent to search is such a factual determination. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973); *United States v. Weir,* 748 F.2d 459 (8th Cir. 1984); *United States v. Briley,* 726 F.2d 1301 (8th Cir. 1984). Thus, the issue of consent by either Lyncook or Mrs. Robinson is not open to review in this proceeding unless the petitioner can demonstrate that the state court determination was erroneous, that is, without support in the record.

There is no argument that Mrs. Robinson did not consent to the search which revealed the blue jacket. The

state court explicitly found, in the face of conflicting testimony on that issue, that she gave her consent. State court credibility determinations are also covered by the presumption of correctness imposed on federal courts in habeas actions. *Marshall v. Lonberger,* 459 U.S. 422 (1983). Thus, this court is unable to say that the jacket was illegally seized and therefore erroneously admitted against the petitioner.

Petitioner's argument with regard to Lyncook's consent to the seizure of the picture is that she did not have common authority over the Robinson apartment or its contents, or other sufficient relationship to the same, to enable her to give valid consent. *See, United States v. Matlock,* 415 U.S. 164, 171 (1974). However, the apparent authority demonstrated by Lyncook's impersonation of Mrs. Robinson, at the petitioner's request, made it reasonable for police to believe she lived in that apartment and had at least partial control of the premises. A search is not invalidated where a police officer in good faith relies on what reasonably, if mistakenly, appears to be a third party's authority to consent to the search. *United States v. Sledge,* 650 F.2d 1075 (9th Cir. 1981).

According to the facts found by the state court and supported by the record, the officer who obtained consent to take the picture left before Lyncook revealed her true identity. Under these circumstances, especially where Lyncook's misidentification was instigated by the petitioner, I find no colorable issue as to the validity of the consent justifying the seizure of the photograph. Aside from the consent issue, I note that I agree with the Nebraska Supreme Court's assessment that the photograph played no material role in convicting the petitioner in

light of other identification evidence. Thus, any failure to suppress the photograph, even if erroneous, in no way prejudiced the petitioner and would not require habeas relief.

Testimony of Government Informant

In what may be considered a claim of prejudice supporting the ineffective assistance of counsel claim, the petitioner argues by pro se brief that the testimony of government informant Koppock as to petitioner's statements to him was erroneously admitted at trial because those statements were deliberately elicited from the petitioner by Koppock, who was then acting as an agent of the state.

It is true that government agents cannot deliberately elicit incriminating statements from an accused after he has been indicted, in the absence of his attorney, without violating the accused's Sixth Amendment right to counsel. *Massiah v. United States,* 377 U.S. 201 (1964). In the situation where a paid government informant, acting at the direction of the government, poses as nothing more than a defendant's fellow inmate when the defendant is in custody and is able to elicit incriminating statements from the defendant, those statements are inadmissible as "deliberately elicited" in violation of the defendant's right to counsel. *United States v. Henry,* 447 U.S. 264 (1980). The key elements of this type of violation are the extent of the prior arrangement involving the government in soliciting the statements and the deliberateness of the elicitation. *United States v. Petty,* 602 F. Supp. 996 (D. Wyo. 1984).

Indeed, the circumstances of petitioner's statements to Koppock are facially similar to those in *Henry* and, if as described by the petitioner, may support a finding of constitutional violation. However, petitioner's characterization of the facts is not supported by the fact findings of the state courts which bind this court in this proceeding. The trial court in ruling on the motion to suppress the informant's testimony found that the statements made to Koppock when the petitioner was in custody were not protected by *Miranda* because they were voluntary and made to a private citizen. The Nebraska Supreme Court stated in affirming the denial of postconviction relief that Koppock was in jail because of his own misconduct and not at the direction of the State Patrol, that Robinson freely and voluntarily made his confession to Koppock and that was clearly admissible.

The basis of petitioner's argument is that Koppock's ongoing salary agreement with the State Patrol was a prior agreement sufficient to indicate impermissible government involvement in eliciting statements. While there was some evidence from which such an improper arrangement might be inferred, such a view of the evidence is directly contrary to the court's finding that Koppock, at the time of the conversations was acting as a private citizen. That finding is amply supported by the record and so is binding on this court to the exclusion of petitioner's assertions otherwise. The court's determination that the statements were voluntary is a legal conclusion subject to habeas review. Upon my review of the record, I agree with the state court's conclusion. The record indicates that the petitioner initiated the conversations with Koppock and that Koppock did not question the petitioner,

nor did he intend to elicit incriminating remarks. The failure to raise this non-meritorious issue on appeal did not prejudice the petitioner in any way.

In accordance with the above discussion the petitioner's claims for habeas relief are without merit and the petition should be dismissed. I will so recommend.

IT THEREFORE IS HEREBY RECOMMENDED:

1. The petition for habeas corpus be dismissed for failure to state a cognizable claim under 28 U.S.C. § 2254, unless within ten days of the receipt of a copy of this recommendation, the petitioner files an objection pursuant to 28 U.S.C. § 636(b)(1).

2. The petitioner is hereby notified that unless objection is made within ten days after being served with a copy of this recommendation, he may be held to have waived any right which he may have to appeal the court's order adopting this recommendation.

February 7, 1986.

BY THE COURT

/s/ David L. Piester
United States Magistrate

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[1]Fact finding on the suggestivity of the identification procedures is unnecessary because the reliability of the identification may still outweigh any impermissible suggestiveness and make the identification admissible despite it. In the petitioner's case it does indeed appear that the photographic and in-person show-ups—notorious for their inherent suggestivity, *United States v. Henderson*, 719 F.2d 934 (8th Cir. 1983); *United States v. Cook*, 464 F.2d 251, 253 (8th Cir.), *cert. denied* 409 U.S. 1011

(Continued on following page)

(Continued from previous page)

(1972), were impermissively suggestive, especially where there was little justification for failure to use line-up or photo array procedures. *Stovall v. Denno,* 388 U.S. 293 (1967). *See, United States v. Henderson, supra,* at 937, n. 4.

[2]Petitioner was positively identified by the victim, Mr. Pfiefer. The automobile Klaumann followed from the scene was registered to him at the address where he was arrested. A blue coat described by Klaumann as having been worn by the robber was found at the petitioner's apartment at the time of his arrest. He was arrested with twenty-seven dollars "rolled up" in his pocket, and Pfiefer's testimony indicated the robber had absconded with approximately thirty dollars, which he had put into his pocket. In addition, the challenged testimony of Robert Koppock clearly points to the petitioner as the robber.

APPENDIX E

IN THE SUPREME COURT OF
THE STATE OF NEBRASKA

THE STATE OF NEBRASKA,	)	NO. 82-028
	)	
Appellee,	)	MOTION OF
	)	COURT-
vs.	)	APPOINTED
	)	APPELLATE
DARWIN J. ROBINSON,	)	DEFENSE
	)	COUNSEL TO
Appellant.	)	WITHDRAW

COMES NOW the Douglas County Public Defender, pursuant to Rule 1(e)(1) of this Court, and shows to the Court that he is representing the above named appellant by court appointment herein, that appellant's counsel has thoroughly and conscientiously examined the records in said case, has briefed all legal issues which might arguably support a direct appeal, has found none of them to be arguable on their merits, and has concluded that a direct appeal can only be considered wholly frivolous.

WHEREFORE, the Douglas County Public Defender moves the Court, pursuant to Rule 1(e)(1) of this Court, for leave to withdraw from further representation of the above named appellant on his appeal, and for a suspension of the appellant's current brief day herein pending a final ruling on this Motion by the Court.

THOMAS M. KENNEY,
Douglas County Public Defender,

By /s/ Stanley A. Krieger
ASSISTANT PUBLIC
DEFENDER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion and counsel's Memorandum Brief in Support thereof was served upon Paul Douglas, Attorney General and attorney for appellee herein, by depositing it in the United States Mails, postage prepaid, and addressed to him at the State Capitol Building, Lincoln, Nebraska 68509, on this 2nd day of December, 1982.

/s/ (Not legible)

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

THE STATE OF NEBRASKA, Appellee, vs. DARWIN J. ROBINSON, Appellant.	NO. 82-028 MEMORANDUM BRIEF OF COURT-APPOINTED APPELLATE DEFENSE COUNSEL IN SUPPORT OF MOTION TO WITHDRAW

STATEMENT OF FACTS

This was a prosecution of the appellant, hereinafter called the defendant, who was charged with one count of robbery, one count of use of a knife to commit a felony and one count of being an habitual criminal. The defendant was originally arraigned on February 19, 1981 and certain pretrial matters were held. The defendant was

thereupon brought to trial on October 5, 1981 but the jury was unable to reach a verdict and the Court declared a mistrial. The defendant was thereupon brought to trial again on November 2, 1981. Original pretrial motions and objections remained outstanding at the time of the second trial.

On March 19, 1981, a hearing was held to determine admissibility of identification of the defendant and also certain physical evidence obtained from him in the course of the arrest. The assistant manager of the Kwik Shop at 66th and Maple Streets in Omaha testified at that hearing that at approximately 6:30 A.M. the defendant was in his store browsing around, looking at magazines and discussing the weather with the witness. The witness continued his duties and at approximately 6:55 A.M. the defendant put a knife in his back and ordered him to open the cash register (B/E Addendum-Suppression Hearing 2-5). The witness did as ordered and the defendant left the store and in doing so, passed another employee, Mick Klaumann, who was coming in. The witness stated that he observed the defendant for approximately one-half hour and stated he was wearing blue pants and a brown or leather coat, although he was not sure, and had a brown stocking hat pulled over his hair (Addendum-Suppression Hearing 6-8). The witness stated he was shown no photographs nor attended any lineup but he was positive that the defendant was in fact the individual who robbed him. The witness did stated (sic) that he was not exactly sure on the color of the pants involved (Addendum-Suppression Hearing p. 12). The witness also gave a physical description of the defendant to police at 160 to 165 pounds, 5′7″ to 5′8″. He gave a description at the preliminary hearing

as 5'9" to 5'10", 160 pounds and further stated that he could have even said 5'6" (Addendum-Suppression Hearing p. 14). He further stated on cross-examination that he saw the knife and he gave a description to the police, describing it as a serrated butcher knife approximately 10 to 11 inches long. (Addendum-Suppression Hearing 15-16).

Michael Klaumann, the employee who was entering when the defendant was leaving, also testified at the hearing that as he pulled up to the store, he saw an individual standing behind the counter and that he passed him as he was walking in and the man was walking out. He described him as wearing blue jeans and a medium-colored blue nylon jacket with the letters "UNO" on it. He identified the defendant as the individual he saw and he also remembered him as an individual who about a week prior had pulled into the gas station, had pumped gas and left without paying (Addendum-Suppression Hearing 17-21). Mr. Klaumann turned around and followed the defendant who got into a white Buick and then drove away. Mr. Klaumann followed him to an apartment where the defendant parked the car. At that point, Mr. Klaumann found a policeman and took him back to the apartment complex where the defendant had parked the car. He described the defendant as 5'6" to 5'7", 150 to 160 pounds, medium brown complexion, wearing a navy blue jacket and blue jeans (Addendum-Suppression Hearing 21-22). He also identified Exhibit 1 as a photograph a police officer showed him and the witness stated that that was in fact a picture of the man he saw. He stated he was only shown one picture and was asked whether the picture was the man who he saw or was it someone else (Addendum-Suppression Hearing 24-25).

Police Officer James Patterson testified that he investigated the robbery at the Kwik Shop and went to the apartment complex where the car had been followed. He went to the complex initially on a report that Mrs. Shirley Robinson had reported her vehicle stolen (Addendum Suppression Hearing 33-34). That vhiecle (sic) was reported to be a white 1971 Buick. Prior to going to the apartment, the officer had also received a report that the car reported stolen was also involved in a robbery at the Kwik Shop. The officer and another officer went to the apartment and spoke to a woman who initially identified herself as Shirley Robinson and stated she wanted to report her car stolen. The officer advised her that the car had been involved in a robbery and indicated that there was a possibility of a false report. At that time, the individual stated that she was not Shirley Robinson but another individual, Edna Lyncook. She stated that she was told by the defendant to call and report the car stolen to police (Addendum-Suppression Hearing 34-37). Ms. Lyncook then advised the officers that the defendant was upstairs in her mother's apartment. The officers went to the apartment upstairs and either knocked or the door was open and the defendant was seated inside. The defendant was arrested and advised of the charges and he was handcuffed and brought down to his apartment so that he could get dressed. He was wearing some pajamas and a robe at the time. He was also wearing an undershirt and blue jeans. They returned to the defendant's apartment which was unlocked and where Edna Lyncook remained. The officers went in with the defendant and he obtained a coat and otherwise got dressed. The officers were further advised that the defendant's wife was sleeping in the bedroom and they went back to wake her and she identified herself. They advised her why they

were there and asked her permission to look for a hat and coat that the defendant allegedly wore to the robbery and Mrs. Robinson gave her consent. They then looked through the apartment and found a blue jacket and a hat which they seized (Addendum-Suppression Hearing 37-42). The officer admitted that he did not ask the defendant specifically for permission to search but did ask his wife.

Officer Charles Pane testified at the hearing that the defendant was booked and searched in a normal procedure prior to putting him in a cell. In his possession was a total of $50.00 in bills including two ten-dollar bills, one five-dollar bill, and 25 one-dollar bills (Addendum-Suppression Hearing 47-50).

Officer Crinklaw testified at the hearing that he was involved in the investigation of the robbery and also entered the defendant's apartment with Officer Patterson. A woman admitted them (who was actually Edna Lyncook) who identified herself as the defendant's wife and the officer asked her permission for a photograph of the defendant and the woman obtained a photograph and gave it to the officers (Exhibit 1). The officer then took the photograph to Mr. Klaumann who identified the defendant. The officer stated at the time that he did that (obtained the photograph and left to show it to Mr. Klaumann) he was under the belief that Mrs. Robinson had been the individual he had talked to when in fact he found out later that it was someone else (Addendum-Suppression Hearing 52-56).

The defendant's wife also testified at the suppression hearing and stated that she was awakened by an officer who had a picture of her husband that she had sitting on the TV. He asked her if that was her husband and she advised him affirmatively and then the officers began search-

ing the apartment. She specifically stated that they did not ask her permission to search (Addendum-Suppression Hearing 57-59).

Prior to the second trial, a hearing was held to determine the admissibility of certain statements made by the defendant to Robert Koppock, an inmate in the Douglas County Correctional Center at the same time the defendant was there, who was also, from time to time, a paid informer for the State Patrol. Mr. Koppock testified that he was in jail for receiving stolen property and assault and met the defendant during his incarceration pending his release on bail. He stated that although he was from time to time paid by the Nebraska State Patrol for information, he was not at that time working for the State Patrol nor had they requested that he get any information in this matter. During his contact with the defendant, the witness stated that the defendant told him that he walked into the Kwik Shop with a butcher knife, held the place up, and was followed home by a witness (B/E Addendum 5-28).

The defendant's second trial commenced on November 2, 1981. On January 31, 1981, Marvin Pfeifer was employed at the Kwik Shop at 66th and Maple Streets in Omaha, Nebraska. His testimony as to what occurred was substantially the same as his testimony at the suppression hearing. He did state that he talked to the defendant approximately 10 to 15 minutes while he was in the store prior to the robbery (B/E 15). He further stated that in response to the defendant's demands, he gave the defendant all the money in the cash register which was approximately $30.00, constisting mostly of ones with a few fives (B/E 18). He did testify that he gave the police originally a description of the defendant's jacket as a brownish check-

ered CPO-type jacket. He admitted that he found out later that he had actually described the coat worn by the other Kwik Shop employee, Michael Klaumann, who entered at the time the defendant was leaving (B/E 21). He also stated that if he testified at a suppression hearing that the defendant was wearing a leather coat, that was mistaken. He did not remember the defendant wearing a leather coat (B/E 24-25).

As the defendant was leaving the store, another employee, (Michael Klaumann) was entering and passed the defendant on the way in. Mr. Klaumann's testimony was substantially the same as that at the pretrial supression hearing. Mr. Klaumann stated that he had seen the defendant twice before, once for a minute or so and another time for a couple of minutes and that he had previously spoken to him briefly on a prior occasion (B/E 56). He followed the vehicle, as he had previously stated at the suppression hearing, to the St. James Apartments on 61st Street. At no time did he ever lose sight of the vehicle and he was able to see the defendant in the vehicle. In pursuing the defendant's car, he also noted a license number which he gave to the police (B/E 62-64). He observed the defendant leave the vehicle, wearing the same clothes that he had observed him wearing as he came out of the Kwik Shop, and then he flagged down a police car (B/E 65). The witness identified the defendant in Court as the person who he was talking about and who he had observed. He further identified Exhibit 2 as the jacket worn by the defendant which was shown to him by a police officer. Exhibit 2 is the same color and has the "UNO" logo on it (B/E 67-68). After the defendant was taken into custody, he was asked to identify him in the police car and

the witness identified the defendant at the scene (B/E 69). On cross-examination, Mr. Klaumann stated that the defendant had on a previous occasion obtained gas at the store and failed to pay. On those occasions, he noted the license number which he remembered and made his report to his supervisor but did not know of any follow-up (B/E 79).

Edna Lyncook stated that she is related to the defendant and lives three stories above the apartment of the defendant and his wife in the same apartment complex. At approximately 7:30 A.M. on January 31st, she was sleeping when she answered a knock on the door to find the defendant standing there. He asked to use the phone and then he started looking out of the window. When she inquired as to what he was doing, he stated that the police were looking at his car. At that point, she looked out of the window to observe several police officers looking at the defendant's vehicle. When she inquired as to why they were there, he stated to her that he tried to steal some gas from the Kwik Shop. The officers then towed the vehicle away. He then asked her to impersonate his wife and call the police station to report that somebody was towing his car away. She thereupon complied with the request, identifying herself when she called as Shirley Robinson, the defendant's wife. She was not aware at that time that he had robbed the Kwik Shop. The defendant remained in her apartment and she went down to the defendant's apartment to tell his wife what was going on. Mrs. Robinson was standing in the apartment and the witness told her that the police were on their way to talk to her about the car. While she was doing this, the police knocked on the door and Mrs. Robinson jumped into bed and the witness

opened the door for Officer Patterson and several other officers. She admitted advising them that she was Mrs. Robinson but she knew they knew she was not telling the truth. The police had advised her that they were looking into the defendant's robbery of the Kwik Shop. The police then advised her as to the problem she may be involved in if she gave them false information and the witness thereupon advised them of her real name and that the defendant was located in her apartment upstairs. She then went upstairs with the officers and entered her apartment where they located the defendant. The witness further stated that the officers never asked for a photograph and that one of them simply took the photograph off the TV. She also stated that the defendant offered her $20.00 to come to Court and state that he never went to the Kwik Shop (B/E 94-111). Police Officers Crinklaw, Patterson and Pane testified in substantially the same manner as they did at the pretrial suppression hearing, as did Robert Koppock who testified in a pretrial hearing on admissibility of statements made to him by the defendant in jail. Officer Pane testified that the defendant was brought back to the Kwik Shop where he was identified by Michael Klaumann and that none of the officers said anything about the defendant except asking Mr. Klaumann to identify him. Mr. Klaumann also identified the coat at that location also (B/E 164-166). The officer further testified that the money (Exhibit 4) found on the defendant during the booking process was not folded in any way but was just wadded up into the pocket (B/E 166-167).

The defendant produced James Clark, an employee of the Douglas County Department of Corrections, who testified concerning Exhibit 5, the record for phone calls made

by Darwin Robinson during the time he was in the Penitentiary. He indicated that the record showed that the first phone call was August 27th and the last was October 5, 1981 (B/E 203-206). The officer stated that he was not actually at the telephone at the time and that the inmate completes the log, not the officer. Robert Koppock had previously testified that he had overheard telephone conversations the defendant was having around the 17th, 18th or 19th of August.

The Court on motion of the defense dismissed Count II of the information and subsequent to the conviction by the jury on the other count, a post-trial hearing was held to determine whether the defendant was an habitual criminal. At that hearing, certified copies of the defendant's previous convictions were introduced into evidence and the Court found that he was an habitual criminal (Addendum to Bill of Exceptions 30-40).

ISSUES ARGUABLY SUPPORTING AN APPEAL

Prior to trial, there were hearings to determine the admissibility of the identification of the witness, statements made by the defendant to a fellow prisoner (Mr. Koppock) in jail, and evidence seized at his apartment at the time of the arrest (Addendum-Proceedings of Suppression Hearing p. 63; Addendum B/E p. 28). There was no error in the Court's overruling the motions. The proscriptions of *Miranda v. Arizona* apply to statements made by the defendant to police officers which were elicited from the defendant by surreptitious means or by interrogation. It does not cover voluntary statements made to third parties who are not acting as police officers or their equivalent. See *State v. Cruch,* 205 Neb. 781, 290 N.W. 2d 207 (1980). Mr.

Koppock was in jail because of his own conduct and being charged with a crime having nothing to do with the defendant's case. At the time of his incarceration, he was apparently employed by the State Patrol as an informer but was not acting on behalf of the State Patrol nor under any instructions from them relative to the defendant's case. In fact, the State Patrol did not know the defendant was in jail. He was under no assignment at the time he was incarcerated with the defendant. Any statements made by the defendant were certainly voluntary and were not made in response to any questions nor were they results of any surreptitious means by any police to obtain statements from him. The fact that Mr. Koppock voluntarily chose to divulge information received from the defendant to the police is beyond the reach of *Miranda v. Arizona* under the facts in this case. See also *Monsell v. State,* 403 S. 2d 871 (Miss. 1981, where a cellmate overheard defendant's admissions and revealed that to police). The facts in this case are distinguished in those situations where undercover police officers, or persons specifically employed by the police to obtain information from the defendant, are placed in a cell with the defendant for the express purposes of interrogation. See *State v. Travis,* 360 A. 2d 548 (R.I.1976). See also *People v. Cramer,* 293 N.W. 2d 744 (Mich. 1980).

The Court also properly allowed into evidence exhibits seized at the defendant's apartment. The essence of the defendant's claim that the evidence was unlawfully seized is apparently based on the fact that entry into the apartment was without consent and that seizure of the items in question was without permission. Later evidence is clear that Edna Lyncook, identifying herself as the defendant's wife, admitted the police to the defendant's apartment. In

addition, police officers indicated that they received consent from Mrs. Robinson to look around (Addendum-Suppression Hearing p. 42). Mrs. Robinson disputes that (Addendum-Suppression Hearing p. 61). In addition, the police indicated that they received permission to take a picture of the defendant, Exhibit 1, from Edna Lyncook who at the time they thought was Mrs. Robinson (B/E 108, 126). While there may be some discrepancy in the evidence, the credibility of the witnesses and the weight of their testimony is for the trier of fact to decide and will not be disturbed unless clearly wrong. *State v. Leary,* 185 Neb. 76, 176 N.W. 2d 520. Clearly the Court chose to believe the State's version of the facts concerning what occurred in that apartment at the time of the defendant's arrest. This Court has stated on many occasions that in determining the sufficiency of evidence, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. *State v. Leflin,* 201 Neb. 824, 272 N.W. 2d 376 (1978). Counsel cannot say that the Court abused its discretion in finding under the totality of the circumstances that the police had received consent, at least from individuals who had identified themselves as the occupants of the apartment, pursuant to the explicit instructions of the defendant himself.

The defendant also objected to the eyewitness identification of Mr. Klaumann and his use of one photograph to identify the defendant. The testimony of Mr. Klaumann indicates that he passed the defendant as the defendant was leaving the Kwik Shop and followed his vehicle to the defendant's residence and observed the defendant leave the vehicle. He further stated that he recalled the defendant

from previous incidents at his Kwik Shop where the defendant obtained gasoline and then left without paying. Mr. Klaumann identified Exhibit 1, shown to him by the police, as the person who he passed while entering the Kwik Shop store and the same individual who he followed and who he recollected from a previous incident (B/E 55-56). Determination as to whether identification procedures conducted by police were unnecessarily suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be made by consideration of the totality of the circumstances. *State v. Joseph,* 202 Neb. 268, 274 N.W. 2d 880 (1977); *State v. Nance,* 197 Neb. 95, 246 N.W. 2d 868 (1976). The mere fact that police may have indicated that they had a possible suspect does not destroy the validity of pretrial identification procedures. When photographs are shown by the police, it is implicit that one or more of the photographs contain pictures of persons the police believe may have committed the offense. *State v. Bolden,* 196 Neb. 388, 243 N.W. 2d 162; *State v. Joseph,* supra. Identification based on a witness's independent recollection of seeing the defendant at the time of the robbery has an origin independent of any photographic identification procedures. See *State v. Pratt,* 197 Neb. 382, 249 N.W. 2d 495 (1977). As a general rule, identification testimony of one who has actually observed a crime is admissible and it is for the trier of fact to determine whether the testimony is worthy of credence. *Sanchell v. Pratt,* 530 F. 2d 286 (8th Cir. 1976). It is clear from the totality of the circumstances that the identification by Mr. Klaumann was not tainted by any impermissible police practices, and specifically not by viewing a single photograph of the defendant at the scene. Mr. Klaumann had an opportunity to view the defendant, follow him in his vehicle from the scene of the crime without

losing sight of him and observe him exit the vehicle. He also knew the defendant by sight from two previous incidences. The Court properly overruled the motion to suppress the eyewitness identification. It would appear that even if there had been some error in the photographic identification, that it would have been harmless beyond a reasonable doubt in view of the other identification evidence presented by Mr. Klaumann.

The State made an objection which was sustained on the basis that the question had been asked and answered (202). There is no error.

The defense objected to the introduction of Exhibit 1, the photograph, and Exhibits 2 and 4, the jacket and money taken from the defendant (B/E 129; 168). In addition to the discussion of these matters in the context of the motion to suppress, which arguments are incorporated herein by reference, the Court has broad discretion in allowing the admission of articles or objects to which testimony relates when any fact or issue may be explained by such production. *State v. Eickmeier,* 87 Neb. 491, 191 N.W. 2d 815. The Court did not abuse its discretion in allowing admission of these objects.

The defendant made the usual motion for a directed verdict. There is clearly sufficient evidence, if believed, to find the defendant guilty. He was identified by both the victim and Mr. Klaumann who passed him and followed him to his apartment. In addition, certain items were taken from the defendant which were identified by the victim and Mr. Klaumann. Further, the defendant made certain admissions to Mr. Koppock in the Douglas County Correctional Center. While there are some discrepancies,

the credibility of the witnesses and the weight of their testimony is for the jury to decide and will not be disturbed unless clearly wrong. *State v. Leary,* supra. It is clear the jury chose to believe the State's version of the events that occurred rather than the defendant's story. This Court will not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. *State v. Leflin,* supra. These are matters juries are vested with the power to determine and the jury has exercised its function and determined the facts as they saw them based on the evidence and testimony presented.

A post-trial hearing was held to determine whether the defendant would be sentenced as an habitual criminal. Counsel for the defendant moved to dismiss the habitual criminal on the basis that the State had failed to prove that the defendant had actually served more than one year in jail (Addendum to B/E p. 40). The essential elements of an information charging the defendant with being an habitual criminal are that he be twice previously convicted of crime, sentenced, and committed to prison for terms not less than one year each. Section 29-2221, R.R.S. 1943, Reissue 1979. It appears that trial counsel's objection is that the Saate (sic), while clearly proving by certified copies that the defendant had been sentenced to more than one year on two previous convictions, had failed to show that he actually served more than one year. Counsel can find no law which supports that proposition. It is sufficient to prove that he has been twice convicted, sentenced and committed to prison for terms not less than one year. The Defendant was committed for terms of more than one year and the State has proved the essential elements in the habitual criminal allegation. Counsel for the defendant indicates

that it is his view that it is the burden of the State to show how long the defendant was actually in prison. Clearly, the State has carried its burden by submitting certified copies of the prior convictions and if the defense had a factual basis for claiming that the defendant served less than one year, the burden certainly shifted to the defense to submit that to the Court. There was no error in the Court's finding the defendant an habitual criminal.

The Court sentenced the defendant to a term of 15 to 45 years for the crime of robbery and ten years to be served consecutively to the robbery charge for use of a knife in commission of a felony. The sentences are within the statutory limits and will not be disturbed without a showing of an abuse of discretion. *State v. Ralls,* 192 Neb. 621, 223 N.W. 2d 432. In addition, the use of a knife charge must, by statute, be served consecutively. Counsel cannot say that the Court abused its discretion in view of finding the defendant an habitual criminal. Further, the sentence complies with the minimum and maximum limitations on sentences. *State v. Suggett,* 189 Neb. 714, 204 N.W. 2d 793.

Counsel's examination of the bill of exceptions, presentence report, and other trial court and appeal records does not reveal any other acts or omissions of the trial court, jurisdictional defects, plain error, or violations of basic constitutional rights which might be raised on appeal in the absence of objection below.

Respectfully submitted,

/s/ Stanley A. Krieger
Assistant Public Defender
Attorney for Appellant

IN THE SUPREME COURT
OF THE STATE OF NEBRASKA

THE STATE OF NEBRASKA,	)	NO. 82-028
	)	
Appellee,	)	
	)	PROOF OF
vs.	)	SERVICE
	)	
DARWIN J. ROBINSON,	)	
	)	
Appellant.	)	

STATE OF NEBRASKA)
) SS
COUNTY OF DOUGLAS)

STANLEY A. KRIEGER, being first duly sworn on oath, deposes and states that he is one of the attorneys for appellant herein, and that on the 2nd day of December, 1982, he did serve true copy of his Motion of Court-Appointed Appellate Defense Counsel to Withdraw and Memorandum in Support thereof upon Paul Douglas, Attorney General of the State of Nebraska, by depositing it, postage prepaid, in the United States Mails and addressed to him at the State Capitol Building, Lincoln, Nebraska 68509.

THOMAS M. KENNEY,
Douglas County Public Defender,
Attorney for Appellant,

By /s/ Stanley A. Krieger
ASSISTANT PUBLIC DEFENDER

SUBSCRIBED AND SWORN to before me this 2nd day of December, 1982.

/s/ Deb Savine
Notary Public

My Commission Exp. Oct. 30, 1982

APPENDIX F

REVISED RULES OF THE SUPREME COURT OF THE STATE OF NEBRASKA

3. Criminal Cases Pending Review.

B. Court-Appointed Counsel in Criminal Cases; Withdrawals; Withdrawals from Frivolous Cases.

(1) Counsel appointed in District Court to represent a defendant in a criminal case, other than a post-conviction action, shall, upon request by the defendant after judgment, file a notice of appeal and continue to represent the defendant unless permitted to withdraw by this court.

(2) A motion of court-appointed counsel for permission to withdraw shall state the reason for the request, and shall be served upon opposing counsel and the defendant.

(3) If court-appointed counsel concludes after a review of the record that an appeal in a criminal case, whether a direct appeal or post-conviction action, is wholly frivolous, counsel may make a motion to withdraw.

a. The motion shall state that counsel has reviewed the entire record, researched applicable law, and has concluded the appeal is frivolous.

b. The motion to withdraw must be accompanied by a brief referring to anything in the record which might arguably support the appeal.

c. Form: The motion and the brief shall be typewritten on either 8½-by 11 or 8½-by 14-inch paper. After January 1, 1983, all motions and briefs must be on 8½-by 11-inch paper. Both the motion and brief shall be on the same size paper. The motion and brief shall be stapled together at the upper left-hand corner. The original and eight copies (nine total) of both the motion and the brief, together with proof of service on opposing counsel, shall be filed with the Clerk of the Supreme Court.

d. The Clerk of the Supreme Court shall furnish the defendant with a copy of counsel's motion to withdraw and brief in support thereof, advise the defendant that he has 30 days in which he may raise any points he chooses, and that he may make his response or objections in typewritten or hand-printed form.

e. After the 30-day response time has elapsed, the motion will be submitted to the Supreme Court for consideration.

(4) If, upon consideration of a motion under this rule and a review of the record, it appears that the decision of the trial court should be affirmed or reversed, the court may take such action on its own motion.

APPENDIX G

STATE OF NEBRASKA, APPELLEE, v. DARWIN JAY ROBINSON, SR., APPELLANT.

352 N.W.2d 879

Filed July 27, 1984. No. 84-010

1. *Effectiveness of Counsel.* Where one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant.

2. ——. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

3. *Criminal Law: Effectiveness of Counsel: Appeal and Error.* An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.

4. ——: ——: ——. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

5. *Criminal Law: Confessions: Miranda Rights.* Voluntary statements made to third persons who were not then acting as police officers or their equivalent are not inadmissible, even though the individual did not receive his *Miranda* warnings.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Darwin Jay Robinson, Sr., pro se.

Paul L. Douglas, Attorney General, and Calvin D. Hansen, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The appellant, Darwin Jay Robinson, Sr., appeals from a judgment entered by the district court for Douglas County, Nebraska, denying to Robinson relief pursuant to the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). Robinson maintains that the trial court erred in failing to find he had ineffective assistance of counsel at a pretrial suppression hearing and again on appeal to this court. We believe that both contentions are wholly without merit, and for that reason the judgment of the trial court is affirmed.

The facts which give rise to all of this litigation disclose that in the early morning hours of January 31, 1981, a convenience store attendant, Marvin Pfeifer, was robbed at knife point. Just as the robber was leaving, another attendant, Michael Klaumann, came on duty and passed by the robber. As Klaumann entered the store, Pfeifer told him that he had been robbed. Klaumann returned to the street, got into his automobile, and followed a white Buick, as it was the only other car on the street at that time. The driver resembled the individual who passed by Klaumann when Klaumann was entering the store. Klaumann obtained the license number, followed the car to an apartment building, and gave this information to the police.

The authorities then went to the location provided by Klaumann and towed the automobile away. Shortly thereafter, a woman representing herself to be Robinson's wife reported to the police that their car had been stolen or towed away. Investigating officers arrived at Robinson's apartment and spoke with the woman who said she called the police and who held herself out to be Robinson's wife. It later developed that, in fact, the individual was not Robinson's wife but, rather, a Miss Edna Lyncook, who had been instructed by Robinson to represent herself to the police as Robinson's wife. The real Mrs. Robinson was hiding in a bedroom of the apartment when the police arrived.

One of the investigating officers asked Miss Lyncook, who was then representing herself to be Mrs. Robinson, whether he could have a photograph of Mr. Robinson. There is a dispute as to whether Miss Lyncook consented, but at the suppression hearing the trial court resolved that fact in favor of the State. The officer then left the location and returned to the convenience store, where he showed a photograph of Robinson to the attendants. Klaumann immediately identified the photograph as being a picture of the robber.

In the meantime, and while the officer was at the convenience store, Miss Lyncook admitted to the officers that in fact she was not Mrs. Robinson and that Robinson was upstairs in her apartment. The officers went upstairs to the Lyncook apartment and arrested Robinson.

After his arrest Robinson was taken downstairs to his apartment to get a coat. At this point the real Mrs. Robinson was located and advised of her husband's arrest, and

was requested by the officers to grant them consent to search the apartment for certain items believed to have been worn by Robinson at the time of the robbery. She consented to the search, and a blue jacket similar to the type described by Klaumann was found.

While awaiting trial on the charges, Robinson was housed at the Douglas County Correction Center. A regularly paid informant of the State Patrol, a Mr. Koppock, was also being held there after being arrested on charges of assault and receiving stolen property. During the time Robinson and Koppock were incarcerated together, Robinson admitted to Koppock that he had robbed Pfeifer at the convenience store, using a butcher knife. The sometime informant testified at the trial. Furthermore, at the trial both Klaumann and Pfeifer identified Robinson as the robber. The jury returned a verdict of guilty on both the robbery and use of a knife charges, and the court found that Robinson was a habitual criminal.

Robinson's first assignment of error is to the effect that he received ineffective assistance of counsel because his trial counsel did not call Edna Lyncook at the suppression hearing to testify that she was not in fact Robinson's wife, had lied to the police when she told them she was his wife, and did not give consent to the officers for the photograph. Miss Lyncook was in fact called later at the actual trial by the State and testified to all that had occurred, including her false statements to the police. Following his conviction, an appeal was lodged with this court, and court-appointed counsel, pursuant to court rule, filed a motion to withdraw. That motion was considered in detail by this court and an order entered sustaining the motion to withdraw and affirming the conviction and sen-

tence. Robinson maintains that by filing a motion to withdraw he again received ineffective assistance of counsel because there were two valid errors which should have been raised and argued to this court. The first error which Robinson maintains would have entitled him to a reversal was the inadmissibility of the photograph allegedly illegally obtained from Miss Lyncook and which was in plain sight, and, second, the testimony of Koppock to the effect that Robinson admitted committing the robbery.

Before addressing each of these matters individually, we believe it to be of some value to note the rules generally with regard to a claim of ineffective assistance of counsel. In *State v. Holtan,* 205 Neb. 314, 319, 287 N.W.2d 671, 675 (1980), we said: "[W]here one maintains that counsel was inadequate one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant." We further said in *Holtan* at 320, 287 N.W.2d at 675:

> "[I]f competent counsel, after investigation, considers a point worthless, the fact that he is court-appointed does not require him to pursue it. * * * the right to counsel * * * does not include the right to counsel, whether at counsel's expense or government expense, to advance a totally frivolous claim merely because some layman thinks it has merit. . . ."

This view has since been wholly adopted by the U.S. Supreme Court in its recent decision in *Strickland v. Washington,* 466 U.S. —, 104 S. Ct. 2052, 2064-67, 80 L. Ed. 2d 674 (1984), wherein the Court there said:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial proc-

ess that the trial cannot be relied on as having produced a just result.

. . . .

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

. . . .

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365, 101 S. Ct. 665, 667-668, 66 L. Ed. 2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

The U.S. Supreme Court then went on to say in 104 S. Ct. at 2068-69:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> . . . .
>
> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . .
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

While we do not for a moment accept Robinson's argument that the photograph was illegally obtained or should

have been suppressed or that it was error to permit the photograph to have been offered in evidence, nevertheless, even assuming the argument to have validity, Robinson has not met his burden in cases of this nature. The evidence of guilt in this case was overwhelming. There were two eyewitnesses to the robbery, both of whom the evidence discloses had more than adequate time to observe Robinson and were therefore clearly able to identify him in court. Furthermore, once Miss Lyncook conceded to officers, as she did, that she was attempting to pervert justice and assist in hiding the commission of a crime. Robinson would have been arrested, even without the photograph. The photograph played no material role in convicting Robinson. That the investigating officer obtained an identification from the convenience store attendants regarding Robinson at the very moment that Miss Lyncook was admitting to her actions seeking to give false information to the police is of no material significance. The trial court was absolutely correct in disregarding this as evidence of ineffective assistance of counsel.

Likewise, Robinson's claim that he received ineffective assistance of counsel in this court on appeal because a brief was not filed, and, instead, counsel filed a motion to withdraw is wholly without merit. Upon the filing of the motion to withdraw, the court made a careful study of both the record and the legal arguments which would have been raised had briefs been filed. It was clear that neither the contention regarding the photograph nor the testimony of Koppock had any merit. Voluntary statements made to third persons who were not then acting as police officers or their equivalent are not inadmissible, even though the individual did not receive his *Miranda* warnings. *See State*

v. Crouch, 205 Neb. 781, 290 N.W.2d 207 (1980). Koppock was in jail because of his own misconduct and not at the direction of the police. Robinson freely and voluntarily made his confession to Koppock, and that was clearly admissible.

There is simply no basis to Robinson's contention that he received ineffective assistance of counsel, and the trial court was correct in denying the requested relief. The judgment is affirmed.

AFFIRMED.